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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91213413
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

MAPPIN & WEBB, LIMITED,  Opposer  v.  M WEBB, LLC  Applicant.	Opposition No. 91213413  Mark: M WEBB Serial No.: 85460569
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**EVIDENTIARY OBJECTIONS TO THE DECLARATIONS OF RANDY KERCHO, MARISSA WEBB, AND DAVID DIAMOND IN SUPPORT OF  
APPLICANT'S MAIN ACR BRIEF**

**A. Evidentiary Objections to the Declaration of Randy Kercho**

<b>Para. No.</b>	<b>Objections</b>
4	<p>Randy Kercho purports to have “experience in...developing trademarks and strategies for trademark protection” and opines on the legal issues in this case. According to his declaration (no Curriculum Vitae provided), Kercho has held finance and business administration-related positions at various companies and is currently president of an investment company focusing on fashion and apparel brands. (Kercho Decl. ¶¶ 2-3.) There is no evidence that Mr. Kercho has any experience relating to trademark law or that he is an expert in the fields of fashion, branding, consumer perception, survey research, or any related fields. Moreover, analysis of the similarity of the parties’ marks and likelihood of confusion constitutes impermissible legal conclusions on the ultimate legal issue of likelihood of confusion. As detailed below, Kercho’s testimony on these topics should be excluded under <i>Daubert v. Merrell Dow Pharmaceuticals, Inc.</i>, 509 U.S. 579 (1993) and Fed. R. Evid. 702, 401, and 403.</p> <p>The admissibility of expert testimony is governed by Fed. R. Evid. 702 and <i>Daubert</i>, which requires a tribunal to “ensur[e] that an expert’s testimony both rests on a reliable foundation and</p>

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	<p>is relevant to the task at hand.” 509 U.S. at 597. “Rule 702 further requires that the evidence or testimony ‘assist the trier of fact to understand the evidence or to determine a fact in issue.’” <i>Id.</i> at 591. Specifically, “Rule 702’s ‘helpfulness’ standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.” <i>Id.</i> at 591-92.</p> <p>Based on his experience as a financial investor, Kercho purports to offer expert testimony relating to trademark protection, similarity of the parties’ marks, and likelihood of confusion.</p> <p>Under the Board’s Scheduling Order, expert disclosures were due on June 19, 2014, but Applicant failed to disclose Kercho (or anyone else) as an expert. To the extent Kercho attempts to opine on the above issues as a fact witness, his testimony is also improper and should be stricken and/or accorded no weight. <i>See Quaker Oats Co. v. St. Joe Processing Co.</i>, 232 F.2d 653, 655 (CCPA 1956) (“we deem it necessary to comment on the weight to be given the witnesses’ opinions that the marks would be likely to cause confusion. In this respect it has been held that such testimony amounts to nothing more than an expression of opinion by the witness, which obviously is not binding upon either the tribunals of the Patent Office or the courts.”); <i>Varian Assocs. v. Leybold-Heraeus Gesellschaft mit Beschränkter Haftung</i>, 219 USPQ 829, 832 (TTAB 1983) (opposer’s lay witness testimony about likelihood of confusion not probative “in view of the fact that it was obviously influenced by the self-interest of this witness in the outcome of the opposition proceeding”); and <i>In-N-Out Burgers v. Peak Harvest Foods, LLC</i>, 2008 WL 4674604, *4 (TTAB Sept. 29, 2008) (non-precedential) (“Opposer objects to much of the rest of Mr. Lilly’s testimony because the witness did not testify from personal knowledge, nor was he qualified as an expert .... [H]e testified about the meaning and commercial impression of the parties’ marks, although he is not an expert in language or trademarks or the businesses of the respective parties. We again agree with opposer. It is clear that much of Mr. Lilly’s testimony was not based on personal knowledge, nor was he qualified</p>

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	as an expert witness in these fields. Accordingly, his testimony about such matters has no probative value. Fed. R. Evid. 701.”).
5	<p>Kercho opines that Marissa Webb “was instrumental in turning around J. Crew’s women’s fashion image,” and that she “desired to launch her eponymous label utilizing significantly elevated materials and details than she was able to do at J. Crew and market her products into the upper contemporary/entry-level designer marketplace.” Kercho lacks personal knowledge about Marissa Webb’s employment with J. Crew and her personal aspirations to launch an eponymous fashion brand. Fed. R. Evid. 602. Kercho has not worked at J. Crew and was not involved in Webb’s decision to launch her brand. (See Kercho Decl. ¶¶ 6, 8, 9, and 11.) Rather, Kercho’s involvement began <i>after</i> Webb decided to launch her brand, and his role was to “assist Marissa in completely organizing her company,” including selection of the company name, selection of trademarks, and web strategy. (<i>Id.</i>) To the extent Kercho offers an opinion on the above issues, his testimony is not “rationally based on [his] perception,” nor “helpful to clearly understanding the witness’s testimony or to determining a fact in issue.” Fed. R. Evid. 701. As such, Kercho’s testimony is improper and should be stricken and/or accorded no weight.</p> <p>Kercho also opines that “Marissa...had become a well-recognized name in U.S. fashion design.” This constitutes improper expert opinion. Kercho was not identified and is not qualified as an expert witness in consumer behavior to render an opinion about Marissa Webb’s purported recognition in the industry. Fed. R. Evid. 701, 702. Kercho has not conducted a consumer survey and/or any other empirical study on whether relevant consumers know Marissa Webb and/or her label, nor has he established himself as qualified to conduct such work. To the extent Kercho attempts to opine on the above issues as a fact witness, his testimony is self-serving, lacks foundation (e.g., there’s no evidence that he even spoke with a single consumer), and is thus not “helpful to clearly understanding the witness’s testimony or to determining a fact in</p>

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	<p>issue.” Fed. R. Evid. 701. <i>See Pitonyak Mach. Corp. v. Brandt. Indus.</i>, 2010 WL 1619442, *3 (TTAB Apr. 5, 2010) (non-precedential) (“the testimony of opposer’s president that its mark is ‘well known’ is self-serving and does not establish the fame of the mark”); <i>Optimize Techs., Inc. v. Wicom GmbH</i>, 2006 WL 2927856, at *5 (TTAB Sept. 28, 2006) (non-precedential) (“We are not, however, persuaded by opposer’s evidence and argument that OPTI is a famous mark...[Opposer] has offered only self-serving and unsupported testimony that [it] has established goodwill in its marks and a reputation in the industry, and only vague and general statements about awards and kudos that the company has received. This evidence is far from sufficient to establish fame.”). Kercho’s testimony is thus improper and should be stricken and/or accorded no weight.</p>
8	<p>Kercho opines on “the considerable reputation [Marissa Webb] had in the U.S. fashion industry.” This constitutes an improper expert opinion. As detailed above, Kercho was not identified and is not qualified as an expert witness in consumer behavior, survey research, or any other field to render an opinion about Marissa Webb’s purported recognition in the industry. Fed. R. Evid. 701, 702. Kercho has not conducted a consumer survey and/or any other empirical study on whether the relevant consumers know Marissa Webb and/or her label. To the extent Kercho attempts to opine on the above issues as a fact witness, his testimony is self-serving, lacks foundation, and is thus not “helpful to clearly understanding the witness’s testimony or to determining a fact in issue.” Fed. R. Evid. 701. <i>See, e.g., Pitonyak</i>, 2010 WL 1619442 at *3; <i>Optimize</i>, 2006 WL 2927856 at *5.</p> <p>Kercho also purports to opine on consumer perception of the M WEBB mark as follows: “We initially decided on ‘M WEBB’ because it was immediately identifiable as an abbreviation of Marissa Webb’s name.” This constitutes improper expert opinion. Kercho was not identified and is not qualified as an expert witness in consumer perception, survey research, or any other</p>

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	<p>field to render an opinion about consumer perception of the M WEBB mark. Fed. R. Evid. 701, 702. Kercho’s conclusions reflect nothing more than his own <i>subjective</i> opinions. With no survey or empirical evidence, his opinions lack the required “scientific knowledge” that exceeds “more than subjective belief or unsupported speculation.” <i>Daubert</i>, 509 U.S. at 590. See <i>Wolverine Outdoors Inc. v. Marker Volkl (Int’l) GmbH</i>, 2013 WL 5655832, at *5 (TTAB Sept. 30, 2013) (non-precedential) (“[O]pinion testimony has minimal probative value as to consumer perception, and we will not substitute the opinion of a witness, even an expert witness, for our evaluation of the facts.”) (citing <i>Edwards Lifesciences Corp. v. VigilLanz Corp.</i>, 94 USPQ2d 1399, 1402 (TTAB 2010)).</p> <p>Even if the Board finds that Kercho is an expert in the fashion industry/investing into fashion start-ups—which is improper because Kercho was never disclosed and/or qualified as an expert and has not provided sufficient foundation for such expertise, let alone the required resume—his opinions about consumer perception should still be excluded. See <i>Alcatraz Media, Inc. v. Chesapeake Marine Tours Inc.</i>, 107 USPQ2d 1750, 1756-57 (TTAB 2013) (travel writing and journalism expert could not serve “as an expert regarding actual consumer perception”; expert had “never reviewed the legal concepts of trademark law” and “neither visited Annapolis nor personally interviewed other tour guide operators” to determine how the term ANNAPOLIS is used/perceived in the tourism industry); <i>Corporacion Habanos S.A. v. Guantanamera Cigars Co.</i>, 102 USPQ2d 1085, 1095-96 (TTAB 2012) (expert report on consumer perception of the term GUANTANAMERA unreliable because the Board could not “discern any methodology applied by [the expert] in arriving at his conclusions” and “there [was] no evidence to show that there are any standards which he applied to his technique or that his technique is generally accepted by the marketing or advertising community”).</p> <p>To the extent Kercho seeks to opine on the above issues as a fact witness, his testimony is self-</p>

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	<p>serving, lacks foundation, and is not “helpful to clearly understanding the witness’s testimony or to determining a fact in issue.” Fed. R. Evid. 701. <i>See also In-N-Out Burgers</i>, 2008 WL 4674604 at *4. Kercho’s testimony is thus improper and should be stricken and/or accorded no weight.</p>
10-11	<p>Kercho seeks to opine again on consumer perception of the M WEBB mark, Marissa Webb’s purported reputation in the U.S. fashion industry, and the purported “common practice” in the fashion industry for designers to “abbreviate complementary fashion lines when their primary line is branded with their first and last name.” This constitutes improper expert opinion. As detailed above, Kercho was not identified and is not qualified as an expert witness in consumer perception, survey research, the fashion industry, or any other field to render an opinion about consumer perception of the M WEBB mark, Marissa Webb’s reputation in the U.S. fashion industry (if any), or “common practices” in the fashion industry. Fed. R. Evid. 701, 702. <i>See Wolverine</i>, 2013 WL 5655832 at *5 (“[O]pinion testimony has minimal probative value as to consumer perception, and we will not substitute the opinion of a witness, even an expert witness, for our evaluation of the facts.”). Kercho’s conclusions reflect nothing more than his own <i>subjective</i> opinions. With no survey or empirical evidence, his opinions about Marissa Webb’s purported renown and how consumers are likely to perceive the M WEBB mark lack the required “scientific knowledge” that exceeds “more than subjective belief or unsupported speculation.” <i>Daubert</i>, 509 U.S. at 590.</p> <p>Even if the Board finds that Kercho is an expert in the fashion industry/investing into fashion start-ups—which is improper because Kercho was never disclosed and/or qualified as an expert and has not provided sufficient foundation for such expertise, let alone the required resume—his opinions about consumer perception should still be excluded. <i>See Alcatraz</i>, 107 USPQ2d at 1756-57 (travel writing and journalism expert could not serve “as an expert regarding actual</p>

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	<p>consumer perception”; expert had “never reviewed the legal concepts of trademark law” and “neither visited Annapolis nor personally interviewed other tour guide operators” to determine how the term ANNAPOLIS is used/perceived in the tourism industry); <i>Corporacion Habanos</i>, 102 USPQ2d at 1095-96 (expert report on consumer perception of the term GUANTANAMERA unreliable because the Board could not “discern any methodology applied by [the expert] in arriving at his conclusions” and “there [was] no evidence to show that there are any standards which he applied to his technique or that his technique is generally accepted by the marketing or advertising community”).</p> <p>To the extent Kercho seeks to opine on the above issues as a fact witness, his testimony is not “helpful to clearly understanding the witness’s testimony or to determining a fact in issue.” Fed. R. Evid. 701. <i>See also In-N-Out Burgers</i>, 2008 WL 4674604 at *4. As such, Kercho’s testimony is improper and should be stricken and/or accorded no weight.</p>
12-13	<p>These paragraphs relate solely to Applicant’s use of the MARISSA WEBB mark—not at issue in this opposition—and are thus irrelevant. Fed. R. Evid. 401. <i>Place for Vision, Inc. v. Pearle Vision Center, Inc.</i>, 218 USPQ 1022, 1024 (TTAB 1983) (“It hardly needs repeating, however, that in proceedings before this Board the issue of likelihood of confusion must be determined on the basis of the mark as it is presented for registration. Evidence showing uses of the mark in a form different from that displayed on the drawing is not relevant in this opposition proceeding.”). Kercho’s testimony about the MARISSA WEBB mark should be stricken and/or accorded no weight.</p>
14	<p>Kercho speculates that abbreviating the MAPPIN &amp; WEBB Marks to M WEBB is “counterintuitive” and that Marissa Webb “is a more prominent name in the U.S. fashion industry than Opposer.” This constitutes improper expert opinion. As detailed above, Kercho was not identified and is not qualified as an expert witness in consumer behavior, psycho-</p>

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	<p>linguistics, survey research, the fashion industry, or any other field to render an opinion about how consumers may abbreviate the MAPPIN &amp; WEBB Marks and Marissa Webb’s reputation in the U.S. fashion industry. Fed. R. Evid. 701, 702. Kercho’s conclusions reflect nothing more than his own <i>subjective</i> opinions. <i>Wolverine</i>, 2013 WL 5655832 at *5 (“[O]pinion testimony has minimal probative value as to consumer perception, and we will not substitute the opinion of a witness, even an expert witness, for our evaluation of the facts.”). With no survey or empirical evidence, his opinions about Marissa Webb’s purported renown and how consumers are likely to perceive the M WEBB mark lack the required “scientific knowledge” that exceeds “more than subjective belief or unsupported speculation.” <i>Daubert</i>, 509 U.S. at 590. To the extent Kercho seeks to opine on the above issues as a fact witness, his testimony is speculative, lacks foundation, and is not “helpful to clearly understanding the witness’s testimony or to determining a fact in issue.” Fed. R. Evid. 701. <i>See also In-N-Out Burgers</i>, 2008 WL 4674604 at *4. Kercho’s testimony is thus improper and should be stricken and/or accorded no weight.</p>
15-24 and Exs. 2-18	<p>Kercho offers improper purported expert opinions on how consumers may abbreviate the MAPPIN &amp; WEBB Marks, psycho-linguistics, the strong and allegedly weak elements of the MAPPIN &amp; WEBB Marks, and consumer perception of the MAPPIN &amp; WEBB and M WEBB marks. Based on random Google searches that lack any scientific methodology, Kercho concludes that (1) consumers are “unlikely to abbreviate MAPPIN &amp; WEBB to ‘M WEBB’ or otherwise perceive ‘M’ in the M WEBB mark as an abbreviation of ‘Mappin’”; (2) M WEBB “is not a recognized abbreviation” of the MAPPIN &amp; WEBB Marks; and (3) “‘Mappin’ is far more unique and common word than ‘Webb.’” This constitutes improper expert opinion. As detailed above, Kercho was not identified and is not qualified as an expert witness in consumer behavior, psycho-linguistics, consumer perception, survey research, or any other field to render an opinion about how consumers may abbreviate the MAPPIN &amp; WEBB Marks and how</p>

Para. No.	Objections
	<p>consumers will perceive the M WEBB mark. Fed. R. Evid. 701, 702. Kercho's conclusions reflect nothing more than his own <i>subjective</i> opinions. With no survey or empirical evidence, his opinions lack the required "scientific knowledge" that exceeds "more than subjective belief or unsupported speculation." <i>Daubert</i>, 509 U.S. at 590. <i>See also Wolverine</i>, 2013 WL 5655832 at *5 ("[O]pinion testimony has minimal probative value as to consumer perception, and we will not substitute the opinion of a witness, even an expert witness, for our evaluation of the facts."). Moreover, Kercho's random Google searches are unreliable, and there is no evidence that his "methodology" for analyzing consumer perception based on Google searches has ever been tested for error and/or scientifically accepted. <i>See Alcatraz</i>, 107 USPQ2d at 1757 (purported expert who did not visit the relevant area nor speak with the relevant consumers but "just Googled Annapolis Tours" not qualified as an expert regarding actual consumer perception); <i>Trademark Props., Inc. v. A &amp; E Television Networks</i>, No. 2:06-CV-2195-CWH, 2008 WL 4811461, *2 (D.S.C. Oct. 28, 2008) (finding expert report based on an article in the <i>New York Times</i> and on information revealed by various Internet searches unreliable; "There is no evidence that his methodology has been tested, no evidence that his methodology has been subjected to peer review and publication, no evidence regarding his methodology's known or potential rate of error, and no information regarding the acceptance of his methodology within the relevant community. His methodology does not satisfy any of the four <i>Daubert</i> factors, and therefore the conclusions based on that methodology are not reliable.").</p> <p>To the extent Kercho seeks to opine on the above issues as a fact witness, his testimony is not "helpful to clearly understanding the witness's testimony or to determining a fact in issue." Fed. R. Evid. 701. <i>See also In-N-Out Burgers</i>, 2008 WL 4674604 at *4. Kercho's testimony is thus improper and should be stricken and/or accorded no weight.</p> <p>Exhibits 2-18 are offered only in support of Kercho's improper opinions on how consumers may</p>

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	<p>abbreviate the MAPPIN &amp; WEBB Marks, linguistics, and consumer perception of the MAPPIN &amp; WEBB and M WEBB marks and should also be stricken.</p> <p>Exhibits 4-6 also constitute inadmissible hearsay. “[Internet evidence is] admissible only to show what has been printed, not the truth of what has been printed.” <i>Safer, Inc. v. OMS Investments, Inc.</i>, 94 USPQ2d 1031, 1040 (TTAB 2010). “In other words, although Internet printouts may be admitted into evidence, the truth of any statements shown in those printouts remains subject to the rule against hearsay embodied in Federal Rules of Evidence 801 and 802.” <i>Hesen-Minten v. Petersen</i>, 2013 WL 3188908, *5 (TTAB Feb. 26, 2013) (non-precedential). Applicant offers these exhibits for the truth of the matter asserted: that Webb is a common surname. Because no hearsay exception applies, Exhibits 4-6 should therefore be stricken.</p>
17	<p>This paragraph is misleading in that it implies that the allacronyms.com website reports that “M Webb” is a recognized acronym for Applicant and its designer Marissa Webb: “Opposer’s Marks did not appear as a recognized abbreviation for ‘M Webb,’ while M Webb’s MARISSA WEBB mark appeared on the fourth page of the ‘M Webb’ search results.” Contrary to Kercho’s contention, allacronyms.com does not identify or list “M Webb” as a recognized acronym at all. When allacronyms.com recognizes something as a known acronym, it offers proposed possible definitions in the format shown below:</p>


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## Objections

ALLACRONYMS  Any Category

Popular Topics Random Suggest

What does KFC mean?  
71 meanings of KFC acronym or abbreviation



KFC stands for

- 11 KFC Kentucky Fried Cruelty
- 9 KFC Korean Fried Chicken
- 8 KFC Kentucky Fried Chicken
- 6 KFC Kids for Christ
- 5 KFC Kitchen Fresh Chicken
- 3 KFC Kremenchuk Fight College

View K.F.C.

Sort by Rating

Filter by Categories

- Business 1
- Government 1
- Medical 2
- Organizations 2
- Technology 4
- All 7

Filter by Topics

- Airline 1
- Ambulance service 1
- Conference 1
- Event 1
- FIRE 1
- Fire company 1
- Fire protection 1
- ICAO airline code 1
- Pennsylvania 1

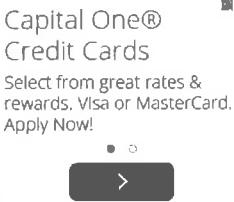
Was it helpful?

Do you use?

ALLACRONYMS  Any Category

Popular Topics Random Suggest

What does AMEX mean?  
8 meanings of AMEX acronym or abbreviation



AMEX stands for

- 14 Amex American Express
- 12 AMEX American Stock Exchange
- 7 AMEX Australian Monsoon Experiment
- 3 AMEX Aeromarket Express
- 3 AMEX Albamex
- 1 AMEX Atlantic Meteorology Experiment

Sort by Rating

Filter by Categories

- Business 2
- Internet slang 1
- Organizations 3
- Science 2
- Technology 4
- All 12

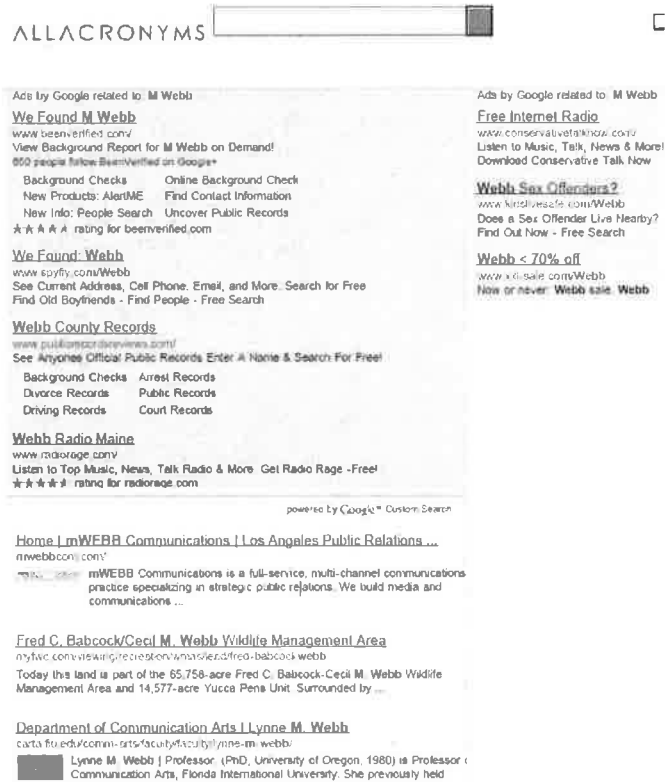
Filter by Topics

- Accounting 1
- Banking 1
- Call Sign 1
- Chat 1
- Finance 2
- Financial 1
- Investing 1
- Meteorology 1
- Securities exchange 1
- Stock 1

Was it helpful?

Do you use?

Attached as Exhibits 5-6 to the Declaration of Anna Naydonov (Sept. 3, 2015) are true and accurate copies of printouts from the allacronyms.com website showing search results for

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	<p>“KFC” and “AmEx.”</p> <p>By contrast, when allacronyms.com is searched for “M Webb,” it reports no abbreviations at all. Rather, it merely switches over to what is a general Google search, returning hits for things like “Joseph M Webb, MD, “Webb posts 11 luxury watches, 3 cars to secure \$10M bond,” etc.:</p>  <p>Kercho’s misleading characterization of allacronyms.com search results amplifies why his random Internet searches are unreliable and why his purported expert opinions lack in scientific methodology and should be stricken.</p>
25-26	<p>Kercho’s attempts to opine that confusion is unlikely because of purported absence of actual confusion<sup>1</sup> and the purported differences in the parties’ marks in appearance, sound,</p>

<sup>1</sup> As discussed in Mappin & Webb’s ACR Reply Brief, there has been no opportunity for actual confusion to occur because neither party has started using its marks at issue in this proceeding in the U.S. (i.e., MAPPIN & WEBB and M WEBB).

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	<p>connotation, and commercial impression contravene the Board’s well-established precedent that a witness’s opinion (fact or expert) on the ultimate issue of likelihood of confusion is neither helpful nor binding on the Board and should be accorded no weight. <i>See, e.g., Mennen Co. v. Yamanouchi Pharm. Co.</i>, 203 USPQ 302, 305 (TTAB 1979) (applying the “long-held view that the opinions of witnesses, including those qualified as expert witnesses, on the question of likelihood of confusion are entitled to little if any weight and should not be substituted for the opinion of the tribunal charged with the responsibility for the ultimate opinion on the question”); <i>Oreck Holdings, LLC v. Bissell Homecare, Inc.</i>, 2010 WL 985352, *2 (TTAB Feb. 16, 2010) (non-precedential) (“In reading [the fact witnesses’] testimony, we have not, of course, considered them to be experts in trademark law, and any opinion relating to the ultimate question of law in this case has been given no weight.”). Paragraphs 25-26 should thus be stricken in their entirety and/or accorded no weight.</p>

**B. Evidentiary Objections to the Declaration of Marissa Webb**

Para. No.	Objections
6	<p>Marissa Webb attempts to opine on third-party consumer perception of her name and brand: “I am known by the initial ‘M.’” She offers no evidence to support this statement. Her opinion thus lacks foundation and is speculative. Fed. R. Evid. 602, 701.</p> <p>Moreover, Webb has no experience relating to consumer perception and she has not conducted any consumer surveys and/or empirical studies to show whether she “is known by the initial ‘M’ in the marketplace.” Her opinion should be excluded under <i>Daubert</i> and Fed. R. Evid. 702. The admissibility of expert testimony is governed by Fed. R. Evid. 702 and <i>Daubert</i>, which requires a tribunal to “ensur[e] that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.” 509 U.S. at 597. “Rule 702 further requires that the evidence or testimony ‘assist the trier of fact to understand the evidence or to determine a fact in issue.’” <i>Id.</i></p>

Para. No.	Objections
	<p>at 591. Specifically, “Rule 702’s ‘helpfulness’ standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.” <i>Id.</i> at 591-92.</p> <p>Here, Webb purports to offer expert testimony relating to consumer perception. Under the Board’s Scheduling Order, expert disclosures were due on June 19, 2014, but Applicant failed to disclose Webb (or anyone else) as an expert in the field of consumer perception or any other field. <i>See Philip Morris Inc. v. Brown &amp; Williamson Tobacco Corp.</i>, 230 USPQ 172, 175 (TTAB 1986) (defendant’s testimony on consumer perception of “RICH LIGHTS” lacked foundation because “Applicant offered no evidence to support a finding that [the witness] had personal knowledge of consumer perception or consumer behavior in calling for the cigarettes bearing the ‘RICH LIGHTS’ designation.”); <i>Wolverine</i>, 2013 WL 5655832 at *5 (“[O]pinion testimony has minimal probative value as to consumer perception, and we will not substitute the opinion of a witness, even an expert witness, for our evaluation of the facts.”).</p> <p>To the extent Webb attempts to opine on consumer perception and her purported fame as a fact witness, her testimony is self-serving, speculative, lacks foundation, and is thus not “helpful to clearly understanding the witness’s testimony or to determining a fact in issue.” <i>See Optimize</i>, 2006 WL 2927856 at *5 (“We are not, however, persuaded by opposer’s evidence and argument that OPTI is a famous mark . . . [Opposer] has offered only self-serving and unsupported testimony that [it] has established goodwill in its marks and a reputation in the industry, and only vague and general statements about awards and kudos that the company has received. This evidence is far from sufficient to establish fame.”); <i>Pitonyak</i>, 2010 WL 1619442 at *3 (“Finally, the testimony of opposer’s president that its mark is ‘well known’ is self-serving and does not establish the fame of the mark.”). Webb’s testimony is thus improper and should be stricken and/or accorded no weight.</p>
8	This paragraph is irrelevant to the extent it relates to Applicant’s selection and registration of the

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	<p>MARISSA WEBB mark, which is not at issue in this opposition. Fed. R. Evid. 401. <i>See Place for Vision</i>, 218 USPQ at 1024 (“It hardly needs repeating, however, that in proceedings before this Board the issue of likelihood of confusion must be determined on the basis of the mark as it is presented for registration.”)</p> <p>Webb also opines on consumer perception of the M WEBB mark, i.e., that it is purportedly “identifiable with [her] personal name.” This constitutes improper expert opinion. Webb was not identified and is not qualified as an expert witness in consumer perception, or any other field, to render an opinion about consumer perception of the M WEBB mark. Fed. R. Evid. 701, 702. Moreover, she offers no consumer surveys and/or other empirical evidence to support that she is well-known in the fashion industry and/or that consumers associate the applied-for M WEBB mark with Marissa Webb. Webb’s conclusions reflect nothing more than her own <i>subjective</i> opinions. <i>See Philip Morris</i>, 230 USPQ at 175 (defendant’s testimony on consumer perception of “RICH LIGHTS” lacked foundation because “Applicant offered no evidence to support a finding that [the witness] had personal knowledge of consumer perception or consumer behavior in calling for the cigarettes bearing the ‘RICH LIGHTS’ designation”); <i>Wolverine</i>, 2013 WL 5655832 at *5 (“[O]pinion testimony has minimal probative value as to consumer perception, and we will not substitute the opinion of a witness, even an expert witness, for our evaluation of the facts.”). With no survey or empirical evidence, her opinions lack the required “scientific knowledge” that exceeds “more than subjective belief or unsupported speculation.” <i>Daubert</i>, 509 U.S. at 590.</p> <p>To the extent Webb attempts to opine on the above issues as a fact witness, her testimony is self-serving, lacks foundation, and is not probative. Fed. R. Evid. 701. <i>See also In-N-Out Burgers</i>, 2008 WL 4674604 at *4. Webb’s testimony is thus improper and should be stricken and/or accorded no weight.</p>

Para. No.	Objections
<p>9-13</p> <p>and</p> <p>Exs.</p> <p>1-23</p>	<p>These paragraphs are irrelevant as they relate solely to Applicant’s use and purported public recognition of the MARISSA WEBB mark, which is not at issue in this opposition. Fed. R. Evid. 401. Exhibits 1-23 are media mentions of Marissa Webb the individual and MARISSA WEBB-brand clothing and are similarly irrelevant. <i>Place for Vision</i>, 218 USPQ at 1024 (“It hardly needs repeating, however, that in proceedings before this Board the issue of likelihood of confusion must be determined on the basis of the mark as it is presented for registration. Webb’s testimony and its accompanying exhibits should thus be stricken and/or accorded no weight.</p>
<p>14-15</p>	<p>Webb opines on how consumers may abbreviate the MAPPIN &amp; WEBB Marks, Mappin &amp; Webb’s reputation in the U.S. fashion industry, and her reputation in the U.S. fashion industry. As detailed above, this constitutes improper expert opinion because Webb was not identified and is not qualified as an expert witness in consumer behavior, psycho-linguistics, consumer perception, survey research, or any other field to render an opinion about how consumers may abbreviate the MAPPIN &amp; WEBB Marks. Fed. R. Evid. 701, 702. Webb’s conclusions reflect nothing more than her own self-serving, <i>subjective</i> opinions. With no survey or empirical evidence, her opinions lack the required “scientific knowledge” that exceeds “more than subjective belief or unsupported speculation.” <i>Daubert</i>, 509 U.S. at 590.</p> <p>To the extent Webb attempts to opine on the above issues as a fact witness, her testimony lacks foundation, is self-serving, and is not probative. Fed. R. Evid. 701. <i>See Optimize</i>, 2006 WL 2927856 at *5 (“We are not, however, persuaded by opposer’s evidence and argument that OPTI is a famous mark . . . [Opposer] has offered only self-serving and unsupported testimony that [it] has established goodwill in its marks and a reputation in the industry, and only vague and general statements about awards and kudos that the company has received. This evidence is far from sufficient to establish fame.”); <i>Pitonyak</i>, 2010 WL 1619442 at *3 (“Finally, the testimony</p>

Para. No.	Objections
	<p>of opposer’s president that its mark is ‘well known’ is self-serving and does not establish the fame of the mark.”). Webb’s testimony is improper and should be stricken and/or accorded no weight.</p>
16-20	<p>Webb opines that confusion is purportedly unlikely because of absence of actual confusion and the alleged differences in the parties’ marks. This contravenes the Board’s well-established precedent that a witness’s opinion (fact or expert) on the ultimate issues of likelihood of confusion is neither helpful nor binding and should be accorded no weight. <i>See Mennen</i>, 203 USPQ at 305 (applying the “long-held view that the opinions of witnesses, including those qualified as expert witnesses, on the question of likelihood of confusion are entitled to little if any weight and should not be substituted for the opinion of the tribunal charged with the responsibility for the ultimate opinion on the question”); <i>Oreck</i>, 2010 WL 985352 at *2 (“In reading [the fact witnesses’] testimony, we have not, of course, considered them to be experts in trademark law, and any opinion relating to the ultimate question of law in this case has been given no weight.”). Paragraphs 16-20 should thus be stricken in their entirety and/or accorded no weight.</p>
18	<p>Marissa Webb claims that “my mark consists of how I am actually know—‘M Webb.’” Her opinion lacks foundation and is self-serving and speculative. Fed. R. Evid. 602, 701. It also constitutes improper expert opinion. As detailed above, Webb was not identified and is not qualified as an expert witness in consumer perception, or any other field, to render an opinion about consumer perception of the M WEBB mark. Fed. R. Evid. 701, 702. Webb’s conclusions reflect nothing more than her own self-serving, unsupported, <i>subjective</i> opinions. With no survey or empirical evidence, her opinions lack the required “scientific knowledge” that exceeds “more than subjective belief or unsupported speculation.” <i>Daubert</i>, 509 U.S. at 590. To the extent Webb attempts to opine on the above issues as a fact witness, her testimony lacks</p>

Para. No.	Objections
	foundation, is speculative, and not probative. Fed. R. Evid. 701. <i>See also In-N-Out Burgers</i> , 2008 WL 4674604 at *4. As such, Webb’s testimony is improper and should be stricken and/or accorded no weight.
20	This paragraph is irrelevant as it relates to a lack of actual confusion between the MAPPIN & WEBB Marks on the one hand, and Marissa Webb’s personal name and/or the MARISSA WEBB mark on the other, which are not at issue in this opposition. Fed. R. Evid. 401, 403. As such, Webb’s testimony should be stricken and/or accorded no weight.

**C. Mappin & Webb’s Objections to the Declaration of David J. Diamond**

Ex. No.	Objections
6, 9, 11, 12, 16, 20	These exhibits are TESS printouts of pending applications for WEBB-formative marks and “are evidence only of the fact that they were filed; they have no other probative value.” <i>Interpayment Servs., Ltd. v. Doctors &amp; Thiede</i> , 66 USPQ2d 1463, 1467 n.6 (TTAB 2003). They should thus be accorded no weight.
21-23	Applicant claims to attach “third-party registrations . . . including the ‘WEBB’ surname.” (Diamond Decl. ¶ 8.) But these exhibits are registrations belonging to <i>Mappin &amp; Webb</i> , not third parties. They should therefore be stricken and/or accorded no weight as to third-party registration and/or use of “WEBB.”
24, 27-29	Applicant claims these website printouts show third-party use of the WEBB surname in commerce. But these exhibits are printouts from foreign websites displaying prices in foreign currencies. Applicant has not provided evidence showing these marks are in use in U.S. commerce, and these exhibits should therefore be stricken and/or accorded no weight. <i>See In re Max Capital Grp. Ltd.</i> , 93 USPQ2d 1243, 1245 (TTAB 2010) (declining to give foreign Internet evidence weight because there was “no reason to believe that when it comes to insurance

Ex. No.	Objections
	<p>services consumers would be aware of a company that is located and operates only in Europe.”);</p> <p><i>In re Canada Enters.</i>, 2013 WL 5498161, *4 (TTAB Sept. 27, 2013) (non-precedential)</p> <p>(“[W]hile evidence obtained from foreign sources may have some probative value depending on the circumstances of the particular case, in this instance, they do not since what is critical is determining how the U.S. consumer will perceive and pronounce applicant’s mark.”).</p>

Dated: September 3, 2015

By: /Douglas A. Rettew/  
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**CERTIFICATE OF SERVICE**

I certify that a true and accurate copy of the foregoing EVIDENTIARY OBJECTIONS TO THE DECLARATIONS OF RANDY KERCHO, MARISSA WEBB, AND DAVID DIAMOND IN SUPPORT OF APPLICANT'S MAIN ACR BRIEF was served by first class mail, postage prepaid, on this 3rd day of September 2015, upon counsel for Applicant at the following address of record:

Molly Buck Richard  
Richard Law Group  
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